

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

J. HOMER FRITCH, INCORPORATED (a corporation), E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,  
*Plaintiffs in Error,*  
vs.

THE UNITED STATES OF AMERICA,  
*Defendant in Error.*

## BRIEF FOR THE UNITED STATES OF AMERICA

JOHN W. PRESTON,  
United States Attorney,

M. A. THOMAS,  
Asst. U. S. Attorney,  
*Attorneys for Defendant in Error.*

Filed

MAR 22 1916

Filed this ..... day of March, 1916 *F. D. Monckton Clerk*

*FRANK D. MONCKTON, Clerk.*

By....., Deputy Clerk.



No. 2683

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

J. HOMER FRITCH, INCORPORATED (a corporation), E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,  
*Plaintiffs in Error,*  
vs.

THE UNITED STATES OF AMERICA,  
*Defendant in Error.*

## BRIEF FOR THE UNITED STATES OF AMERICA

Counsel has fairly stated the case, and I find it necessary to add only a few matters.

The evidence shows that on or prior to September 12th, 1911, the date of expiration of the charter party, the defendants had been notified that the voyage was terminated, and the cargo had been discharged (Tr. p. 41), and that the steamship "Homer" was tendered by the Government to the owners (Tr. p. 38) at Oakland Creek, in the Bay of San Francisco (Tr. p. 39).

All transactions and correspondence between the parties were merged in the charter party dated ~~September 2nd, 1910~~, and the charter party is the best and only evidence of its terms and their meaning, so long as they are unambiguous. There has been no claim that any part of the charter is ambiguous, and, so far as it is concerned, we may forget all that went before.

### ARGUMENT.

The whole case depends on whether the charter party was extended, or whether the option only was extended by the telegram of September 12th, 1911, and the subsequent correspondence.

*The telegram of September 12th, 1911, in terms requested an extension of the OPTION, and not an extension of the CHARTER.*

Paragraph 14 of the charter provided "that the charterers shall have the option of continuing the charter for a further period of thirty days (30) on giving notice thereof to the owners or their agents twenty (20) days previous to the expiration of the first named term or any declared option."

If the defendant in error had desired an extension of the charter, it is only reasonable to presume that its agent would have exercised the right under section 14 and would have asked for a continuance of the charter. But he did not do this. He asked for an extension of the option for purchase according to the terms of section 21 of the charter.

It is true that section 21 of the charter provides "that the charterers have the option *at any time during this charter* of purchasing," etc., on certain terms stated, but the telegram of September 12th, 1911, is not an attempt to exercise the option to purchase. Furthermore, the fact that the charter provides that the charterers have the option at any time during this charter, to purchase, does not preclude the Government from desiring a continuance of the option beyond the term of the charter, nor does it preclude the owners from giving it.

The reasonable interpretation of the phrase "on terms mentioned in paragraph 21 of the charter," is that it has reference to the matters of purchase price, insurance, interest and cost of operation enumerated in that section, and not to the time within which the option may be exercised. An extension of the charter under section 14 would necessarily extend the option, but it cannot be said that an extension of the option extends the charter necessarily, or at all.

*"Otherwise," as used in the telegram, taken with the context, means "in other respects."*

If an extension of the charter were requested by the telegram, there would be no occasion for, and no sense in, adding the words "otherwise charter to terminate as provided therein." It would be unreasonable to say "would like to have an extension

of the charter, else the charter terminate," and that is just what counsel for the plaintiffs in error would have you believe was said and intended.

"If the words used clearly show the intention, there is no need for applying any technical rules of construction, for where there is no doubt there is no room for construction."

(9 Cyc 578.)

Counsel attempts to raise a doubt as to the meaning of the telegram of September 12th, 1911, by introducing two letters marked "personal," and dated December 2nd, 1910 (Tr. p. 64) and December 15th, 1910 (Tr. p. 67), respectively, from W. I. Lembkey to Mr. J. Homer Fritch, and by a certain endorsement made at the bottom of Fritch's copy of the charter party by W. I. Lembkey on the 13th day of September, 1911, one day after receipt by Fritch, of the telegram above referred to. These letters show on their face that they are not official, being marked "personal," and there is not a word of evidence in the record to show that the Secretary of Commerce and Labor or the Commissioner of the Bureau of Fisheries, ever saw them, or knew anything about them.

The fact that they were marked "personal," indicates that the correspondence was not intended for the eyes of the Secretary or the Commissioner, or anybody other than Lembkey and Fritch.

The endorsement made by W. I. Lembkey at the bottom of the charter party, expressly states that it

is "subject to the approval of the Department of Commerce and Labor," and there is no evidence of approval, or even knowledge, of this endorsement by the Secretary, or any other officer of the Department. The endorsement having been made only on the copy in the hands of Fritch, there is every presumption that the Department knew nothing about it.

Lembkey, although he was agent of Seal Fisheries, is not shown to have had any authority either with regard to the letters, or the endorsement, and these transactions show, if anything, an effort on his part, to do something irregular in connivance with J. Homer Fritch. The law does not contemplate that the United States shall be bound by any secret understanding between J. Homer Fritch and a subordinate government officer, without authority.

From the foregoing, we contend that any secret or private understanding or correspondence between Lembkey and Fritch can in no way show the intention of the Secretary of Commerce and Labor when he composed the telegram of September 12th, 1911.

Counsel further argues that a contract was closed extending the charter for a period of thirty days from and after September 13th, 1911, upon receipt by the Secretary of the telegram of September 14th, 1911 (Tr. pp. 27, 84, 86), and the failure upon his part to reply to the telegram or to notify J. Homer Fritch that he did not desire an extension of the

charter. But what did the telegram of September 12th, 1911, request? It requested an extension of the option for thirty days, and not an extension of the charter. There was no meeting of the minds, and therefore no contract as to the extension of the charter, for the offer contained in the telegram to Fritch was not accepted. (9 Cyc 398-d.)

“When an offer is made, and an acceptance is made not in accordance with the offer there is no contract and the attempted acceptance becomes a counter-offer.”

(9 Cyc 267-d.)

The counter-offer, before it can create a contract, must be accepted. (9 Cyc 270.)

The record does not show an acceptance by any authorized officer of the government, of this counter-proposal, to extend the charter, and it is fitting to add here that the fact that Lembkey drafted this telegram sent by Fritch and dated September 14th, 1911 (Tr. p. 87), is further evidence of his desire to play into the hands of Fritch by attempting to fasten upon the government an extension of the charter, and not merely of the option as requested by the Secretary of Commerce and Labor.

Counsel suggests that the Government is bound to an extension of the charter for the thirty-day period because the Secretary of Commerce and Labor permitted the plaintiff to act on the assumption that the charter had been extended. What act did the

plaintiff do? The record shows that the steamship "Homer" was laid up in Oakland Creek at the time that the telegrams passed, and the fact that it remained there for thirty days or a longer time, is not shown to be other than the disposition that would have been made of it if there had been no negotiations for an extension of the option.

Counsel has cited the rule that words will be construed most strongly against the party who used them (9 Cyc 950). On page 591 of the same volume these words are found:

"But this rule it is said, is the last one the courts will apply, and then only if a satisfactory result cannot be reached by the other rules of construction."

The language of the telegram of September 12th, 1911, is not ambiguous when taken in connection with the charter party.

The telegram of September 14th, 1911, undertook to give an extension of the charter, in addition to an extension of the option. The defendant in error was bound only by so much of that telegram as met his offer, and was not bound to advise the plaintiff in error that it did not wish something it had not asked for.

The attempted extension of the charter made by Lembkey on the copy held by Fritch, had no binding effect on the Government or any of its departments, as it was made subject to approval, and was never

approved. The letters by which plaintiffs in error attempt to prove that "option" means "charter" as used by the Secretary of Commerce and Labor in his telegram of September 12th, 1911, do not throw any light on the intention of the parties for the reason that they were personal between Lembkey and Fritch, and are not shown to have ever reached the files of the office or anybody other than Lembkey, who apparently spent a good part of his time working for Fritch.

The Government respectfully submits that there is no error in the record, and that the facts which are for the most part undisputed, justify the findings of the trial court, and the judgment rendered thereon.

Respectfully submitted,

JOHN W. PRESTON,  
United States Attorney,

M. A. THOMAS,  
Asst. U. S. Attorney,  
*Attorneys for Defendant in Error.*